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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Stewart L. Udall, Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 24, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21-38), is reported at 358 F. 2d 840. The opinion and order of the Federal Power Commission (R. 609-717) [1] are reported at 31 F.P.C. 247; its opinion

[1] "R." references are to the joint appendix filed in the court below.

and order on rehearing (R. 780-805) are reported at 31 F.P.C. 1051.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1966 (App. B, *infra*, pp. 39-41). On June 21, 1966, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 21, 1966. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825 (*l*).

QUESTION PRESENTED

The Federal Power Commission is directed by Section 7(b) of the Federal Power Act not to issue any license for a hydroelectric project to exploit water resources that, in its judgment, should be developed for public purposes by the United States. The principal question presented is whether, in a case where federal development seems indicated because of the nature of the project and its relation to existing federal hydroelectric projects, the Commission may issue a license without having conducted its own factual investigation to the extent necessary to assure a full record on the desirability of federal development.

A subsidiary question is whether the Commission was excused from such inquiry by the failure of the Secretary of the Interior to make timely application for leave to present evidence in support of federal development.

STATUTE INVOLVED

Section 7(b) of the Federal Power Act, 16 U.S.C. 800(b), provides:

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

STATEMENT

Section 4(e) of the Federal Power Act (16 U.S.C. 797(e)) empowers the Federal Power Commission to grant licenses for the development of the power resources of streams and other bodies of water subject to federal jurisdiction. Pursuant thereto the Pacific Northwest Power Company (a joint venture of four private power companies) applied in 1958 to the Commission for a license to construct a major hydroelectric project at High Mountain Sheep, a site on the Snake River on the border of Oregon and Idaho (R. 165). In 1960 a competing application was filed by the Washington Public Power Supply System, an association of public utility districts of the State of Washington (R. 247, 251). The applications were consolidated for hearing (R. 258).

Early in the license proceeding, the Secretary of the Interior was asked to submit his views (*e.g.*, R. 236). This is standard procedure in a license case. It reflects the fact that the Secretary has broad responsibilities in the area of water resources development, conservation, water pollution control and wildlife protection—all potentially affected by a major hydroelectric project. In addition, numerous hydroelectric projects have been developed federally, under the aegis of either the Bureau of Reclamation in the Department of the Interior or the Army's Corps of Engineers; and the Department's Bonneville Power Administration markets throughout the Pacific Northwest the power produced by all federal projects in the region including a complex of nine dams located on the Snake and Columbia Rivers downstream from High Mountain Sheep (see p. 5, *infra*).

Initially, the Secretary, in correspondence with the Commission, took the position that a project at High Mountain Sheep was not warranted by the present or foreseeable power needs of the region (R. 126, 138). Later, on June 28, 1962—at a time when the record before the hearing examiner had been closed but the examiner had not yet rendered his decision—the Secretary wrote the Commission advising that in his view High Mountain Sheep should be developed as a federal project and urging the Commission to so recommend to Congress pursuant to Section 7(b) of the Federal Power Act (p. 3, *supra*) (R. 309). The Secretary's reasons (as amplified in later submis-

sions, see, *e.g.*, R. 494-514, 527-605, 718-748) may be summarized as follows.

The Snake River, on which the High Mountain Sheep site is located, flows into the Columbia River, and between High Mountain Sheep and the mouth of the Columbia on the Pacific Ocean there are nine hydroelectric projects constructed or authorized at the present time.[2] All are federal hydroelectric projects whose power is marketed by the Bonneville Administration. This staircase of dams represents a government investment in excess of $1.5 billion.

All of these dams are "run of the river" projects. Lacking substantial storage capacity, they are completely dependent on the vagaries of the natural river flow. When the river level drops, the dams' power plants must shut down; when the levels are high, the additional generating potential is wasted. To overcome the uncertainties of the river flow and enhance power productive capacity, comprehensive plans for developing the water resources of a river system typically provide for the construction of large storage, or "regulating", dams, which not only generate power at the site but, by releasing their stored waters from time to time, enhance the efficiency and productivity of the run-of-the-river dams located downstream from it.

High Mountain Sheep is the last available site on the Snake River for a major regulating dam that will serve the complex of federal projects on the lower Snake and Columbia. Accordingly, whoever develops the site will be required to construct such a dam and

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[2] A map of the area is included following p. 41, *infra*.

to co-ordinate its operation with that of the downstream federal complex. It is unlikely, however, that a non-federal operator—be it a private or public power producer—would achieve as high a degree of co-ordination as could be wished. The primary interest of such an operator—at-site power production for its own power demands—might well conflict with its duty to support and enhance the power productivity of the downstream federal dams, since the schedule in accordance with which a regulating dam must store and release water for the downstream dams may not be the same as the schedule that would best meet the load (power-demand) requirements of the regulating dam. In addition, operation for the benefit of the downstream system has the effect of increasing the power production of a competitor.

The optimal solution is federal development of High Mountain Sheep as an integrated part of the Bonneville system.[3] This is indicated, too, by the fact that High Mountain Sheep, by virtue of its extensive storage facilities, can be expected to serve a variety of public purposes in addition to electric power production and regulation—such as flood control, recreation, navigation, conservation of fish and wildlife, and control of water pollution. A power producer cannot

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[3] Thus, in submitting comprehensive plans for the development of the Columbia River basin, the Army's Corps of Engineers (with the concurrence of the Secretary of the Interior) has consistently recommended federal construction of the system's major regulating facilities. See H. Doc. No. 531, 81st Cong., 2d Sess., Vol. 1, pp. 1-3, Vol. 4, pp. 1429, 1482, Vol. 6, p. 2509; H. Doc. No. 403, 87th Cong., 2d Sess., Vol. 1, pp. iv, viii-ix, 260; pp. 15-16, *infra*.

be expected to shoulder these additional functions with enthusiasm; they are wholly unremunerative. If they are to be effectively performed, federal ownership seems necessary.

So the Secretary argued. The Commission ordered the record of the licensing proceeding reopened for the purpose of incorporating the Secretary's letter of June 28, 1962, and invited the parties to file supplemental briefs in response to it (R. 314-315). The Commission did not ask that evidence on the issues raised by the Secretary be presented (nor did the Secretary make any proffer of evidence), although no evidence on the question of federal v. non-federal development had theretofore been presented.

On October 8, 1962, the examiner rendered his decision (R. 315). He awarded a license to Pacific Northwest. Treating the issue of federal development as an "additional issue raised by the Secretary of the Interior's letter of June 28, 1962" (R. 327), he disposed of it on the ground that there "is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary" (R. 440). He did not particularize this contrary evidence.

The Secretary then petitioned the Commission for leave to intervene as a party in the proceeding, to file exceptions to the examiner's decision, and to participate in the oral argument before the Commission (R. 494-520). The petition was granted (R. 521-523), but no further evidentiary hearing conducted.

In an opinion rendered on February 5, 1964, the Commission affirmed the examiner's award of a license to Pacific Northwest (R. 609). The Secretary's argument that the project should be reserved for federal development was rejected. The Commission found that the "development of the HMS project should not be undertaken by the United States itself" (R. 672). It agreed with "the examiner that the record supports no reason why federal development should be superior," observing that, "[w]hile we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position" (R. 665). With respect to the public purposes (flood control, etc.) that the High Mountain Sheep project would serve, the Commission found "nothing in this record to indicate that [they] * * * will not be served as adequately under the license conditions as would be the case under federal development" (R. 667). As for the co-ordination problem, the Commission stated (*ibid.*): "We agree that the Secretary (or any single operator) normally would have a superior ability to coordinate the operations of HMS with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter * * *."

Finally, the Commission noted that the Department of the Interior had "frankly admitted that it has no present intention of seeking authorization to commence construction or planning to construct an HMS project" (R. 668). The Commission concluded that "the delay inherent in federal construction * * * out-

weighs those benefits which Interior contends would result from federal construction (*i.e.*, superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized" (R. 669).

The Secretary petitioned for a rehearing, asking also that the record be reopened to permit him to present evidence to repair the evidentiary deficiencies noted by the Commission in its opinion (R. 718-748). Rehearing was granted, but reopening denied. The Commission issued a supplementary opinion adhering to its original decision (R. 780).

Both the disappointed applicant (Washington Public Power) and the Secretary sought judicial review of the Commission's award of a license to Pacific Northwest. The Court of Appeals for the District of Columbia Circuit upheld the Commission's order.[4] With respect to the Secretary's argument that the Commission "erred in failing to require an independent staff study and to permit the Secretary to offer evidence respecting federal development" (App. A,

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[4] We are advised that Washington Public Power is filing a petition for certiorari to review the court of appeals' judgment insofar as it decides that as between Pacific Northwest and Washington Public Power the former is entitled to the license. Washington Public Power's contention—unrelated to the issues presented here—is that, assuming any license should have been awarded (rather than the project reserved for federal development), it—not Pacific Northwest—was entitled to the license. It relies on Section 7(a) of the Federal Power Act, which gives a preference to public agencies. If the Secretary's position prevails in this Court and if on remand the Commission declines to issue a license, Washington Public Power's contention will, of course, be moot.

infra, p. 36), the court stated (*id.*, pp. 37-38): "Suffice it to say that his long delay in opposing the grant to Pacific Northwest * * * was sufficient to warrant denial of his motion. * * * [T]he Secretary has no cause to complain that he was not permitted to introduce evidence which he has not proffered or described."

REASONS FOR GRANTING THE WRIT

1. The Federal Power Act authorizes the Federal Power Commission to grant private power companies (or non-federal public power enterprises) long-term licenses to construct and operate for their own use and benefit hydroelectric projects utilizing the flow of navigable rivers or occupying public lands or reservations of the United States. However, since these are federal resources, the Act also provides (§ 7(b)) that "[w]henever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development," but shall, instead, make appropriate recommendations to Congress. We ask the Court to rule whether the Commission adequately exercised the judgment required of it by the statute when it rejected the contention of the Secretary of the Interior that the High Mountain Sheep project on the Snake River should be a federal project and instead licensed it to a private power company.

We do not, however, pray for a final ruling here that High Mountain Sheep is to be a federal project.

Our challenge at this stage is to the Commission's failure—condoned by the court—to require that an adequate record be made as a predicate of decision. The Commission's opinion itself discloses that the record lacked evidence to support an informed and reasoned judgment upon whether the public interest requires federal development of High Mountain Sheep (see Statement, *supra*, p. 8). It could hardly have been otherwise, since neither the Commission's staff, the competing applicants, nor the Secretary of the Interior introduced evidence on the question.

The Commission seemingly—and the reviewing court certainly—attached decisive significance to the Secretary's failure to introduce detailed evidence in support of his plea for federal development. But the responsibility under the statute for appraising the relative merits of federal or non-federal development of a national water resource is the Commission's. In a relatively routine case, perhaps, the Commission might properly rely upon the parties to develop an adequate record. But not, we submit, in a case like this.

At stake here is the public's interest in a major project. The Department of the Interior opposed non-federal development. And the circumstances lend strong support to its position. They disclose that a principal function of the project will be to enhance the power production of a large complex of downstream dams (all federal)—a task requiring the closest co-ordination—and that the project will serve vast public purposes which would be wholly unremunerative to a licensee, whose exclusive concern

would be power production. In such a case, we submit, effective discharge of its statutory responsibility requires the Commission to base judgment upon a comprehensive evidentiary record. Its default in this respect is not excused by the Secretary's failure to proffer evidence.

2. We adumbrate this theory in somewhat greater detail below. Assuming it has merit, we think the case otherwise meets the criteria for review on certiorari. The case has great intrinsic importance. High Mountain Sheep will unquestionably be one of the major power projects in the Pacific Northwest. It will be the key project in a chain of dams on the Snake and Columbia Rivers in which the federal investment will be more than $1.5 billion. And it will have vast potential for recreational, flood control and other public uses for the future. The license to Pacific Northwest has a 50-year term, and recapture at the end of that period is not certain. If the license was improperly granted—if, as the Secretary believes, federal control is necessary in the public interest to assure a project "best adapted to a comprehensive plan" of development (16 U.S.C. 803(a))—the consequence, if this Court declines to intervene, will be permanent public injury of formidable magnitude.

But the legal issue in this case transcends the particular factual situation. The basic question is whether and to what extent the Commission has an independent and affirmative responsibility to gather evidence on issues affecting the public interest where the parties before it are remiss in doing so. Is the Commission no different from a court, which decides controversies between litigants on such evidence as

they may care to adduce? Or—as we believe—must the Commission, if the parties do not offer necessary evidence on matters affecting the public interest, obtain such evidence independently through its staff? This issue has general importance. See *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (C.A. 2), certiorari denied, 384 U.S. 941. It is not limited to proceedings under Section 7(b) of the Federal Power Act. *Scenic Hudson*, *supra*.

3. The initial proposition on which our argument depends is that Congress has granted the Commission, and no other agency, primary responsibility to determine when a national water resource should be licensed to a non-federal applicant and when it should be reserved for federal development. This is the clear implication of Section 7(b) of the Federal Power Act (p. 3, *supra*)—which stresses the Commission's "judgment" without mentioning any other agency—and it is the express teaching of *Chapman* v. *Federal Power Comm'n*, 345 U.S. 153, 168, 172-173. See, also, Section 4(a) of the Act, 16 U.S.C. 797 (a).

It follows, we think, that the failure of the Secretary of the Interior to make timely application for leave to present evidence in support of asserted benefits of federal development is not a ground on which the Commission may properly refuse to recommend federal development to Congress. The responsibility for judgment in this area is the Commission's, not the Secretary's; the interest involved is the public's,

not the Secretary's. Since the Commission has ample investigative powers and resources of its own, it is not obliged to rely on the Secretary to present the necessary factual data. Indeed, for it to depend completely upon the Secretary's initiative would appear to be an abdication of the independent responsibility that Congress wished it to exercise.

We do not suggest that the Commission must in every case undertake its own factual inquiry. In some cases the requisite information will be furnished by the parties; that was not the case here. In others no significant factual issues will be presented; but that also was not true here. In fact, the circumstances of the present case indicated not merely that a factual inquiry was necessary, but that a strong *prima facie* case for federal development existed which could be overcome only by clear and persuasive contrary evidence.

First, High Mountain Sheep is unique in that it is the only remaining site suitable for a regulating reservoir that will serve the federal hydroelectric complex downstream. Thus, we are dealing with a key structure on a river system where the government has already expended vast sums in hydroelectric development. The facilities at High Mountain Sheep must be closely co-ordinated with the downstream dams if the power production of the latter is to be maximized. Presumptively it would appear that successful co-ordination is less likely of attainment if High Mountain Sheep is controlled by a competitor of the Bonneville Administration. The Commission admitted as much (R. 667). Yet, despite its further admission that

"there is no evidence upon which we can determine the scope or the seriousness of this matter" (*ibid.*), it expressed confidence that adequate co-ordination could be assured by the insertion of appropriate conditions in the license. Some conditions, however, such as that governing the allocation of benefits between the various components of the river system, are ambiguous (see R. 784, n. 6, R. 785-786). In general, moreover, the adequacy of conditions—as a substitute for unified control—to assure complete co-operation is questionable, since even the most carefully drafted license cannot anticipate all the problems that will arise during its 50-year term or assure that all disputes will be resolved without protracted litigation. At all events, these are considerations which should have been explored in depth at the hearing, with the aid of expert testimony.

Second, High Mountain Sheep will serve a variety of public purposes unrelated to—and sometimes antagonistic to—power generation. The Commission has sought to assure that Pacific Northwest will adequately implement those purposes, again by inserting conditions in the license. Here, too, there is a serious question whether the conditioning and supervisory power of the Commission is a satisfactory alternative to federal control—and here, too, the record is silent.

Third, in 1950 the Corps of Engineers submitted a comprehensive plan for the development of the Columbia River basin. H. Doc. No. 531, 81st Cong., 2d Sess., Vol. 1, pp. 1-3, Vol. 4, pp. 1429, 1482, Vol. 6, p. 2509. The plan recommended (among other things) federal construction of (1) nine run-of-the-river

dams downstream from High Mountain Sheep and (2) a regulating reservoir for the nine dams at Hells Canyon on the upper Snake. The nine dams were authorized by Congress and constructed as federal projects in accordance with the plan. Hells Canyon was later licensed for private development without adequate regulating facilities. See *National Hells Canyon Ass'n* v. *Federal Power Comm'n*, 237 F. 2d 777 (C.A. D.C.), certiorari denied, 353 U.S. 924. The Corps of Engineers and the Secretary of the Interior then recommended that the federal regulating dam be built (after further study) at High Mountain Sheep—the last suitable site. H. Doc. No. 403, 87th Cong., 2d Sess., Vol. 1, pp. iv, viii-ix, 260.

We do not argue that congressional authorization of the downstream federal projects pre-empted the Commission's authority to license High Mountain Sheep for private development. Compare *Chapman* v. *Federal Power Comm'n*, 345 U.S. 153. But Congress appropriated vast sums for federal development of the Columbia River basin's hydroelectric resources in accordance with an overall plan that contemplated that the key structure in the system would also be federal. In this context the Commission should not have licensed non-federal development without clear proof that it was a completely adequate alternative.

In sum, our argument is that, whatever may be the case where an ordinary run-of-the-river dam in an area of mixed federal and non-federal (or predominantly non-federal) hydroelectric development is involved, there is a presumption in favor of federal development of a major regulating dam that will pri-

marily serve to enhance the power capacity of other federal dams and to fulfill a variety of public purposes such as conservation and flood control. At least such a presumption should be indulged where, as here, Congress has authorized a series of federal dams, constituting in the aggregate a formidable investment of public funds, pursuant to a plan submitted by the executive which calls for a federal regulating dam as a major component of the total system; and the Secretary of the Interior vigoriously argues for federal development. In such a case, the public should not be penalized by executive inaction. The Commission is not free to infer absence of advantages of federal development from lack of affirmative proof of them, as it apparently did here. The burden is upon the license applicants or the Commission's staff affirmatively to demonstrate the compatibility of non-federal development with the over-all public interest, and before the project may be licensed to a non-federal applicant, there must be a complete factual inquiry into the asserted advantages of federal development. There was none in this case.

4. There is a further reason why this matter should be returned to the Commission for reconsideration of its decision to license High Mountain Sheep to a private power company—the record is stale. When the case was before the Commission, it was the Secretary's view that additional power in the region served by the Bonneville Administration was not then needed. Accordingly, while urging that High Mountain Sheep be reserved for eventual federal development, he indicated that even if the Commission rec-

ommended federal development to Congress he would not seek appropriations for immediate construction. In declining to recommend federal development, the Commission gave considerable weight to the lack of any immediate prospect for such development, for it believed strongly that there was a need for early construction of a project at High Mountain Sheep to provide additional power in the Pacific Northwest. Indeed, the Commission's view of the region's power needs may have led it to minimize the problems posed by private control of High Mountain Sheep.

On the basis of developments since the proceeding before the Commission, the Secretary now agrees with the Commission that early development of High Mountain Sheep is justified.[5] He is prepared to seek prompt authorization of a federal project from Congress if the Commission on remand recommends federal development. This change of circumstances underscores, in our view, the inappropriateness of permitting the Commission's decision upon the inadequate record that was before it to stand as the final determination in this matter of great public importance.[6]

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[5] For example, the extra-high voltage transmission intertie between the Pacific Northwest and the Pacific Southwest, now under construction, will open vast new markets for Bonneville power.

[6] There is an additional change of circumstances that should be noted. The Commission's findings as to the economic feasibility of Pacific Northwest's plan of development assumed that Pacific Northwest would also be obtaining revenue from a companion project to be constructed by it at Lower Canyon on the Salmon River, a tributary of the Snake (R. 622, 626-627). However, if the National Wild Rivers Bill (S. 1446,

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
RICHARD A. POSNER,
Assistants to the Solicitor General.

ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys.

FRANK J. BARRY,
Solicitor,

EDWARD WEINBERG,
Deputy Solicitor,

HARRY HOGAN,
Associate Solicitor,

ERNEST J. LONDON,
Attorney,
Department of the Interior.

August 1966.

89th Cong., 2d Sess., passed by the Senate on January 29, 1966, and now pending before the House of Representatives) is finally enacted, as appears highly probable, such a project would be precluded, the purpose of the bill being to preserve the Salmon River in its natural state. In addition, we note that the Commission apparently did not consider that a project at Lower Canyon would very likely be precluded by its adverse impact on the salmon and steelhead trout industry (cf. R. 630-631)